

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1259**

In the Matter of the Medical License of
Christopher John Kovanda, M.D.
License No. 41657.

**Filed May 22, 2023
Affirmed
Hooten, Judge***

Minnesota Board of Medical Practice

John M. Degnan, Brayanna J. Bergstrom, Taft Stettinius & Hollister LLP, Minneapolis, Minnesota; and

Nicole L. Brand, Besse H. McDonald, Meagher + Geer, P.L.L.P, Minneapolis, Minnesota (for relator Christopher Kovanda)

Keith Ellison, Attorney General, Daniel S. Schueppert, Rebecca Huting, Assistant Attorneys General, St. Paul, Minnesota (for respondent Minnesota Board of Medical Practice)

Considered and decided by Wheelock, Presiding Judge; Bryan, Judge; and Hooten, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

Relator Dr. Christopher Kovanda appeals by writ of certiorari the order of the Minnesota Board of Medical Practice (the board) revoking his license to practice medicine

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

in the state of Minnesota. Because we defer to the board's credibility determinations, we conclude that there was substantial evidence to support the board's conclusion that Dr. Kovanda engaged in prohibited sexual conduct against two of his patients. We therefore affirm.

FACTS

Dr. Christopher Kovanda, a board-certified plastic surgeon, has been licensed to practice medicine in Minnesota since July 1999.¹ Dr. Kovanda has been self-employed at Kovanda Aesthetic Plastic Surgery since 2015. In February 2021, the Minnesota Medical Board's disciplinary committee filed a notice and order for hearing,² alleging that Dr. Kovanda engaged in sexual misconduct with respect to four patients between 2010 and 2019. Only two patients, patient #2 and patient #3, are relevant to this appeal.

The committee and Dr. Kovanda participated in a hearing in front of an administrative law judge (ALJ). At the hearing, the ALJ heard testimony from eleven witnesses, including patient #2, patient #3, patient #3's husband, members of

¹ From 2011 to 2014, Kovanda maintained a conditional medical license. The board imposed conditions on Kovanda's license after Kovanda entered into a Stipulation and Order with the board based on his use of suggestive language toward and touching of one patient in 2009 and his having sexual intercourse with another patient after a post-operative visit. The conditions required "(a) a female chaperone to be present when [Kovanda] treated any female patients, (b) coursework in professional boundaries, (c) practice in a preapproved setting, (d) a supervising physician, (e) quarterly meetings with a designated board member, and (f) payment of a civil penalty." These conditions lapsed in 2014 when Kovanda received an unconditional license from the board.

² The board filed one notice and three amended notices. The above-referenced notice is the third amended notice. In the four notices, the board alleged that Kovanda committed misconduct with respect to four patients. The hearing addressed all four allegations, but the board only found that there was substantial evidence of Kovanda's misconduct with respect to patients #2 and #3.

Dr. Kovanda's staff, two expert witnesses, and Dr. Kovanda. The ALJ also received evidence that included a transcript of a recorded interview of patient #2's friend and a transcript of a recorded phone call between Dr. Kovanda and patient #2.

Patient #3 testified first, recounting that in the summer of 2010, she requested that Dr. Kovanda perform carpal tunnel surgery on both of her wrists, a tummy tuck, and a breast reduction. Patient #3 stated that Dr. Kovanda first performed surgery on her left wrist and that nothing unusual occurred during the appointments related to the first surgery. She related that at the consultation for the remaining procedures, she was sitting on the examination table when Dr. Kovanda walked quickly toward her, lunged, and grabbed both of her breasts. As he grabbed her breasts, Dr. Kovanda straddled her right knee, putting his testicles on it for approximately five seconds before she moved away in shock. He then continued with a breast examination as normal. Patient #3 testified that although she did not tell anyone at the office, she did tell her husband about the incident when she returned home. Despite her discomfort with Dr. Kovanda, patient #3 chose not to "cancel everything and start all over" and instead proceeded with the remaining procedures. Patient #3's husband's testimony relaying his wife's version of the incident at the time it occurred was consistent with her testimony at the hearing.

Patient #2 also testified at the hearing, relating that she first set up a breast-augmentation consultation appointment with Dr. Kovanda in the summer of 2019. She testified that during her consultation, Dr. Kovanda appeared to caress her leg, and after she undressed and moved in front of a mirror, Dr. Kovanda stood behind her closely with his hands resting on her hips. She found the behavior strange, and she called her friend to

discuss it. After arriving at the center on the day of surgery and while sitting alone in the pre-operation room, she began to hyperventilate but remained conscious. The nurses calmed her down and got her into a comfortable resting position. Then, when the nurse looked away, Dr. Kovanda pressed his erect penis into patient #2's feet and rubbed it against them. Then Dr. Kovanda asked the nurse to leave. He approached patient #2, pushed her legs apart, grabbed her backside, and pulled her into him. She testified that she could feel his penis beneath his scrubs pressed against her vagina. Patient #2 and a private investigator later called Dr. Kovanda and recorded the telephone conversation. During the conversation, Dr. Kovanda initially denied the allegations, but later stating "sorry. . . for you feeling my penis pushed against you."

Dr. Kovanda testified, denying the allegations by both patients. But he conceded that there were brief periods where he was alone with patient #2 without nurses or staff present. His staff testified, however, stating that they saw nothing supporting patient #2's allegations. Dr. Kovanda offered no evidence contradicting patient #3's testimony that she was alone with him in the examination room at the time of the alleged misconduct.

The ALJ, based on the testimony, concluded that Dr. Kovanda violated Minn. Stat. § 147.091, subd. 1(t) (2022), with respect to patients #2 and #3, and subd. 1(g) (2022) with respect to patient #2. The ALJ recommended disciplinary action. The board adopted all of the findings of the ALJ and revoked Dr. Kovanda's medical license. Dr. Kovanda appeals.

DECISION

On appeal Dr. Kovanda challenges the board's decision to revoke his license based on his alleged violations of Minn. Stat. § 147.091, subd. 1(g), (t). Under these subdivisions,

the medical board may impose disciplinary action if a doctor engages in “any unethical or improper conduct” or engages in “conduct with a patient which is sexual or may reasonably be interpreted by the patient as sexual, or in any verbal behavior which is seductive or sexually demeaning to a patient.” Minn. Stat. § 147.091, subd. 1(g), (t).

An administrative agency’s decision enjoys a presumption of correctness, *In re Revocation of Family Child Care License of Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003), and we will only reverse an agency’s determination where the determination violates the constitution, exceeds the agency’s authority or jurisdiction, is made under an unlawful procedure or other error of law, is not supported by substantial evidence, or is arbitrary and capricious, Minn. Stat. § 14.69 (2022). “With respect to factual findings made by the agency in its judicial capacity, if the record contains substantial evidence supporting a factual finding, the agency’s decision must be affirmed.” *In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 290 (Minn. App. 2010) (quotation omitted). The party challenging an agency decision bears the burden of establishing that the agency findings are not supported by substantial record evidence. *In re Rev. of 2005 Ann. Automatic Adjustment of Charges*, 768 N.W.2d 112, 118 (Minn. 2009). Substantial evidence is “defined as: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Cannon v. Minneapolis Police Dep’t*, 783 N.W.2d 182, 189 (Minn. App. 2010) (quotation omitted). Because the board adopted the ALJ’s findings, Dr. Kovanda challenges the ALJ’s factual determinations underpinning the board’s decision.

Dr. Kovanda argues that there is not substantial evidence supporting the ALJ's misconduct findings because the findings rest on the testimony of patients #2 and #3 whose testimony, Dr. Kovanda asserts, was not credible. In so arguing, he relies principally on the supreme court's decision in *In re Wang*, 441 N.W.2d 488 (Minn. 1989). In *Wang*, the supreme court reviewed the dental board's decision to revoke a dentist's license in part based on his alleged sexual conduct toward three patients. *Id.* at 490. The *Wang* court reversed the board's decision and concluded that the decision was not supported by substantial evidence because the ALJ relied only on the testimony of the three complaining witnesses whose testimony was contradicted by other eyewitnesses. *Id.* at 493-94.

But Dr. Kovanda's case is distinguishable from *Wang* in three material ways. First, in *Wang*, the dentist's employees all testified that they were present when the alleged instances of misconduct occurred and that the misconduct did not occur. *Id.* at 493. The same cannot be said in this case. Here, Dr. Kovanda offered no evidence to rebut patient #3's assertion that at the time the misconduct occurred, she was alone in the room with him. And with respect to patient #2, Dr. Kovanda conceded that there were brief periods of time where he was alone with her.

Second, the *Wang* court relied heavily on the "disquieting evidence" that suggested the complaining patients misconstrued "Dr. Wang's attempts to put their apprehensions at ease." *Id.* The court noted that Dr. Wang, who was raised and educated in China, spoke "less-than-perfect English" and had a "less-than-perfect understanding of American culture and mores." *Id.* There is nothing in the record to suggest to us that the same unawareness of cultural mores can be said of Dr. Kovanda, who has practiced in Minnesota since 1999

and who—after a prior disciplinary action based on similar accusations—completed coursework on maintaining professional boundaries with patients.

Third, and most importantly, unlike in *Wang*, the ALJ here relied on more than just the complaining patients' testimonies. The board presented evidence of the patients' independent, contemporaneous reporting of the alleged misconduct to their loved ones. With respect to patient #2, the ALJ relied on the fact that patient #2's testimony about the assault was corroborated by her friend, who patient #2 called hours after her surgery. The ALJ noted that the friend reported to the investigator that during that phone call, patient #2 told her that:

[W]hen he went to put the markings on her, she said that he climbed on top of her and rubbed his d-ck on her. And she said he had a boner and she pushed him off and said, "What are you doing?" And then he acted like nothing happened. And so she was super shocked by that, and that was right before she went under, was about to go in.

The ALJ also heard corroborating testimony from patient #3's husband, a retired police detective. The husband recounted that after his wife came home from her appointment, he spoke with her in the kitchen. He testified that when the two spoke in the kitchen, his wife told him that:

[W]hen she was at the checkup she was getting her—I believe she was just in her panties and sitting on the examining table and Mr. Kovanda came up and examined her breasts and then moved closer in and straddled her knee and proceeded to set his crotch down on either her knee or the top of her thigh.

The ALJ relied on the husband's testimony, finding him to be a credible witness who testified in a sincere and forthright manner.

Dr. Kovanda's argument that patients #2 and #3 were not credible does not compel a different result. The ALJ concluded that the patients were credible, and "a court cannot substitute its judgment for a board's on the credibility of witnesses." *Padilla v. Minnesota State Bd. of Medical Examiners*, 382 N.W.2d 876, 886 (Minn. App. 1986), *rev. denied* (Minn. Apr. 24, 1986). We decline to do so here, especially given that the ALJ's credibility determinations are amply supported by the record.

Dr. Kovanda maintains that patient #2's "pattern of lying" warrants our reversing the board's decision. He cites as examples patient #2's omitting her mental health history from her intake form at Dr. Kovanda's office and telling her therapist nine days after her surgery that she was pleased at the "successful" outcome of her surgery and not mentioning the alleged incident. Based on these facts, Dr. Kovanda relatedly contends that patient #2 lied under oath, either at her deposition (when she said she stated that she "never lied" to her therapist) or at the hearing (when she testified that she had lied to her therapist about her initial thoughts on the procedure).

We defer to the ALJ's credibility determinations. "As the sole judge of credibility, a fact-finder is free to accept part and reject part of a witness's testimony." *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), *rev. denied* (Minn. Nov. 18, 2003). *See also In re Thompson*, 935 N.W.2d 147, 156 (Minn. App. 2019) ("It is well-established that appellate courts generally defer to credibility determinations made by an agency's fact-finder."). The ALJ was free to reject patient #2's statements that she never lied to her therapist while accepting her testimony at trial regarding the sexual misconduct as true. The ALJ explained that during her testimony, patient #2 "appeared to be sincere and very upset by what she

testified had happened,” and determined that she was credible. Even if the record provided us reasons to doubt the ALJ’s credibility determination, as we stated previously, the ALJ did not only rely on patient #2’s testimony at trial, but he also relied on the deposition testimony by patient #2’s friend corroborating patient #2’s account of the misconduct at the time it occurred.

Dr. Kovanda contends that patient #3 was also not a credible witness, citing as proof her inability to recall exactly which preoperative visit the misconduct occurred at, her delayed reporting, her continuing to receive surgery from Dr. Kovanda after the alleged misconduct occurred, and her allowing Dr. Kovanda to use her before-and-after pictures in his advertisements. Again, this could have led to a different credibility determination by the ALJ. But like patient #2, patient #3’s testimony was corroborated by her contemporaneous reporting. And the ALJ found the corroborating witness, patient #3’s husband, to also be credible.

We note for the sake of completeness that after hearing conflicting testimony from Dr. Kovanda and the patients, the ALJ had substantial reasons to conclude that it was Dr. Kovanda’s testimony that lacked credibility. With respect to patient #2, although Dr. Kovanda denied the allegations against him, those denials were inconsistent with his statements to patient #2 during a recorded telephone call that were submitted as evidence. During that conversation, Dr. Kovanda told patient #2 that he was “sorry. . . for you feeling my penis pushed against you” and he acknowledged that there was no explanation for his behavior. In making its credibility determination, the ALJ relied on this recorded apology. The ALJ also weighed the testimony of patient #3 and her husband against Dr. Kovanda’s

and concluded that “[p]atient #3 and her husband had little to gain by their testimony and [Dr. Kovanda] had much to lose if he admitted that [p]atient #3’s allegation was true.” We see no error in this characterization.

We conclude that Dr. Kovanda has failed to satisfy his burden to establish that the ALJ’s findings, and the board’s revocation of his license based on its adoption of those findings, were not supported by substantial evidence.

Affirmed.